

**Enerhaul, Inc. and Ronald J. Culwell.** Case 10-CA-16646(E)

August 31, 1982

# SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On May 11, 1982, Administrative Law Judge Richard J. Linton issued the attached Supplemental Decision in this proceeding. Thereafter, the Applicant and the General Counsel filed exceptions and supporting briefs, and the Applicant filed a response to the General Counsel's exceptions. The Applicant also filed a response to the General Counsel's motion to dismiss petition, which was served on the Administrative Law Judge subsequent to the issuance of his Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions, briefs, and other submissions and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

On March 22, 1982, the Board issued an Order dismissing the complaint in the underlying unfair labor practice case.<sup>1</sup> The Applicant, pursuant to the Equal Access to Justice Act (hereinafter EAJA), 5 U.S.C.A. § 504 (1982), applied for an award of attorney's fees and expenses in this case. The Administrative Law Judge found that the position of the General Counsel in the underlying case was "substantially justified" within the meaning of EAJA. Accordingly, he ordered that the application be dismissed.

EAJA provides that an administrative agency shall award to a prevailing party certain expenses incurred in connection with an adversary adjudication, unless the agency finds that the position of the government was "substantially justified." The legislative history of EAJA characterized "substantially justified" as a test of reasonableness, and further clarified that, "[w]here the Government can show that its case had a reasonable basis both in law and fact, no award will be made."<sup>2</sup>

<sup>1</sup> Not reported in volumes of Board Decisions.

<sup>2</sup> H.R. Rept. No. 1418, 96th Cong., 2d sess. 10 (1980), reprinted in 5 U.S. Code Cong. & Ad. News 4984, 4989.

Cf. *Wyandotte Savings Bank v. N.L.R.B.*, 110 LRRM 2929, 2930 (6th Cir. 1982) ("mere fact that the NLRB was the losing party or the fact that the NLRB's position was contrary to prior Sixth Circuit precedent

Based on our review of this case, we conclude that the position of the General Counsel was reasonable in law and fact. In particular, we note the Administrative Law Judge's finding in his original Decision that the General Counsel established a *prima facie* violation of the Act—a finding to which no party excepted.<sup>3</sup> We therefore agree with the Administrative Law Judge's finding that the General Counsel's position was substantially justified within the meaning of EAJA. Consequently, the Applicant's application shall be dismissed.<sup>4</sup>

## ORDER

It is hereby ordered that the application of the Applicant, Enerhaul, Inc., Birmingham, Alabama, for an award under the Equal Access to Justice Act be, and it hereby is, dismissed.

does not mean that the Board was not substantially justified in seeking enforcement of its order").

<sup>3</sup> We do not, however, suggest that a finding that the General Counsel established a *prima facie* case is a prerequisite to finding the General Counsel's position reasonable in law and fact. We shall continue to analyze EAJA applications on a case-by-case basis.

Chairman Van de Water recognizes that the General Counsel is bound to issue a complaint consistent with Board precedent contemporaneous with his consideration of the case, and Chairman Van de Water therefore agrees with the finding herein that the General Counsel's position was reasonable in law and fact. But, he does not intend to imply that, were he deciding the merits of this case, he would agree (on the basis of the facts herein) that the employee engaged in "concerted activity."

<sup>4</sup> Given our holding herein, we find it unnecessary to address the General Counsel's exceptions to the Administrative Law Judge's Supplemental Decision.

## SUPPLEMENTAL DECISION AND ORDER

RICHARD J. LINTON, Administrative Law Judge: This is a supplemental proceeding under the Equal Access to Justice Act (EAJA: Public Law 96-481—October 21, 1980; 94 Stat. 2325), and Section 102.143, *et seq.*, of the Board's Rules and Regulations.

Enerhaul, Inc. (Enerhaul or Applicant), has filed its application, dated March 26, 1982, for an award of fees and expenses under the EAJA. By its application, Enerhaul claims a total of \$7,450.50 for fees (no expenses claimed) as a result of defending itself in the underlying unfair labor practice case, *Enerhaul, Inc.*, Case 10-CA-16646.<sup>1</sup>

In his April 22, 1980, motion to dismiss the application, the General Counsel raises several procedural objections. He also moves to dismiss the application on the merits.

I find it unnecessary to address the procedural grounds relied on by the General Counsel, for it is clear from my Decision in the underlying case, and I hereby find, that the position presented by the General Counsel in Case

<sup>1</sup> Case 10-CA-16646 was heard before me in Birmingham, Alabama, on December 7 and 8, 1981. On February 12, 1982, I issued my Decision and recommended Order that the complaint be dismissed (JD-(ATL)-7-82). In the absence of exceptions, the Board issued its Order of March 22, 1982, adopting my order dismissing the complaint.

10-CA-16646 was "substantially justified" within the meaning of the EAJA. Accordingly, the application must be dismissed.

ORDER<sup>2</sup>

It is ordered that the application is dismissed.

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<sup>2</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.